United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6201

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

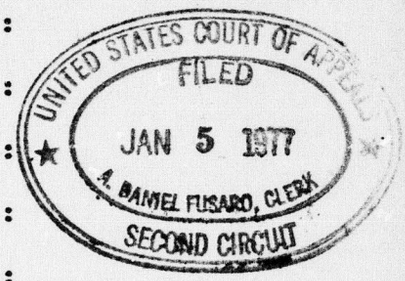
WILLIAMSBURG FAIR HOUSING COMMITTEE, et al.,
Plaintiffs-Appellants,

-against-

NEW YORK CITY HOUSING AUTHORITY, et al.,
Defendants-Appellees,

-and-

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURG, INC., et al.,
Intervenor-Defendants-Appellees.



76-6201

Docket No. 76-6201

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURG, INC., et al.,
Third-Party Plaintiffs-Appellees,

-against-

KENT VILLAGE HOUSING CO., INC, et al.,
Third-Party Defendants-Appellants.

BRIEF FOR APPELLANTS IN SUPPORT OF THEIR APPLICATION FOR A STAY AND/OR AN EXPEDITED APPEAL

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QUESTIONS PRESENTED

1. Whether the district court could properly issue an "interim order" extending the terms of a temporary restraining order indefinitely beyond twenty days without having afforded any party but the movants the right to present their case, without making findings of fact or conclusions of law, and without finding that the movants had met their burden of demonstrating the need for injunctive relief.

2. Whether the Fair Housing Act of 1968 [42 U.S.C. §3612(a), (c)] authorizes the district court to dispense with the procedural protections of Fed. R. Civ. P. 52 and 65 (i) under any circumstances and, if so, (ii) under circumstances where the matter is on trial and no "conciliation," within the meaning of the statute, is taking place or in prospect.

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from an "interim order" of the United States District Court for the Southern District of New York (Tenney, J.) dated December 23, 1976 which continued indefinitely a temporary restraining order issued December 6, 1976 and renewed December 16, 1976. (A copy of that order is annexed as Appendix A to the affidavit of Herbert Teitelbaum, sworn to January 3, 1977, in support of appellants' application for an expedited appeal and/or a stay). Appellants are the plaintiffs and the third-party defendants (Kent Village Housing Co., Inc. and Los Sures Management Co., Inc.) below.

Statement of Facts

The issue presented on this appeal is a narrow one, but one that has substantial practical importance. Its resolution does not require the Court to scrutinize the facts in detail or to adjudicate the merits of the substantive issues (e.g., the existence of ethno-racial quotas in housing and the presence of neighborhood "tipping") that underlie this lawsuit. The procedural posture of this case makes such analysis premature, for the district court has taken evidence from only one of the parties to the dispute and has to date issued no findings of fact. What is in dispute here is not whether the record reflects an abuse of discretion; the record is ac-

knowledged by all to contain only one party's case. What is in dispute is whether the district court had the power, under either statute or the Federal Rules of Civil Procedure, to issue the order that it did at the time and in the way it did. The facts pertinent to that issue are by and large uncontested.

The Williamsburg Fair Housing Committee, the Division Avenue Tenants Association, Inc., and twenty-five Hispanic and black individuals commenced this class action on May 11, 1976. Their complaint charges, among other things, that the New York City Housing Authority ("NYCHA") has engaged in a pattern and practice of using racial, ethnic and religious quotas which deny plaintiffs and members of their class equal access to public housing in a section of Williamsburg, Brooklyn. The following projects, all within or near the Williamsburg Urban Renewal Area ("WURA") in Brooklyn, are involved: Independence Towers, Jonathan Williams Plaza, and Bedford Gardens, where plaintiff-appellants allege a 75% white (mainly Hassidic) and 25% Hispanic and black quota is in operation; Taylor-Wythe Houses, where plaintiff-appellants allege a 60% white (mainly Hassidic) and 40% Hispanic and black quota is in operation; and 115-123 Division Avenue, where plaintiff-appellants allege a 90% white (mainly Hassidic) and 10% Hispanic and black quota is in operation. Use of such quotas, it is alleged, is in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act of 1968, 42 U.S.C. §§3601, et seq., and the Civil Rights Act of 1964, 42

U.S.C. §2000d.[1]

On the day the complaint was filed, plaintiffs moved by order to show cause for a preliminary injunction against the further use of such quotas. The district court granted a temporary restraining order that barred any further rental, either through initial tenancy or turnover, at three Williamsburg developments owned and operated by the NYCHA,[2] and at parts of two other developments which are publicly subsidized private units leased by the NYCHA under a federal housing program.[3] The motion for a preliminary injunction was made returnable May 19, 1976.

On May 18, a motion for intervention was filed by the United Jewish Organizations of Williamsburg, Inc. ("UJO") and two individual Hassidic Jews, as members of sub-classes of Hassidic Jewish leaseholders and applicants for public housing. The next day, an order permitting them to intervene as defendants was issued, and the UJO then filed an answer claiming that the ethno-racial quotas which they acknowledged in the designated projects were permissible, valid and constitutional.

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1 Issue was joined with respect to the NYCHA after the filing on June 1 and June 7 of its answer and amended answer, respectively. Those pleadings deny the existence of quotas.

2 Jonathan Williams Plaza, Independence Towers, and Taylor-Wythe Houses.

3 The order affected 192 units in Bedford Gardens and 64 units at 115-123 Division Avenue. Bedford Gardens and Taylor-Wythe are located in the Williamsburg Urban Renewal Area ("WURA"); Independence Towers stands within the WURA geographical boundaries but is not part of the urban renewal project; Jonathan Williams Plaza is two blocks from the northeast boundary of the WURA; 115-123 Division Avenue is situated on the northwest boundary of the WURA.

The restraining order was continued, and a hearing date for the week of June 21 was set on plaintiffs' motion for a preliminary injunction.

On May 24, 1976, the UJO moved for a temporary restraining order and a preliminary injunction against the tenant selection procedures at Roberto Clemente Plaza ("Clemente"), a new and then-still vacant publicly subsidized Mitchell-Lama "§236" project in the WURA, on the ground that those procedures discriminate against Hassidic Jews. A restraining order was entered, pending a hearing on June 3 on the UJO's motion for a preliminary injunction. Simultaneously, the UJO sought to join as third-party defendants the United States Department of Housing and Urban Development ("HUD"), the Housing and Development Administration of the City of New York ("HDA"), Kent Village Housing Company, Inc., the sponsoring group of Clemente, and Los Sures Management Company, Inc., the management company of Clemente. (That request was granted on December 10.)

On May 28, plaintiffs filed by order to show cause a motion for a temporary restraining order and a preliminary injunction against further rental or leasing at Bedford Gardens on the grounds that the defendants were utilizing race, national origin and religion as qualifications for renting the publicly subsidized private housing units [4] according to a 25% quota for minority persons. Declining to issue the restraining

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4 In the original complaint, only the leased public housing units under the jurisdiction of the NYCHA were challenged. By motion filed May 28, 1976, plaintiffs also sought leave to amend their complaint to add as defendants the private owner (Ross-Rodney Corp.) and management agent (Kraus Management, Inc.) of Bedford Gardens, thereby bringing within the sweep of the lawsuit all of the units in Bedford Gardens. This motion was ultimately granted on December 10, 1976.

order, the district court made the motion for a preliminary injunction returnable June 3. It also consolidated the motion directed at Bedford Gardens with the motions directed at Clemente. After hearing argument on June 3, the district court issued a memorandum decision on June 7, vacating all outstanding temporary restraining orders on the ground that their continuance would cause loss of funds, and thus irreparable damage, to the City of New York.

Upon the court's urging, all parties agreed on June 15 to suspend the litigation and to attempt to reach an out-of-court settlement, using the offices of the Community Relations Service of the United States Department of Justice. Numerous discussion sessions were held up until December of 1976 when, without advance notice to any other party, the UJO moved on December 3 by order to show cause for a temporary restraining order and preliminary injunction barring any further tenanting or leasing of apartment units at Clemente. UJO's motion averred that the sponsor and management of Clemente (appellants here) were renting on a discriminatory basis, and that if less than 75% of the tenants at Clemente were white, Clemente would be or become segregated. (Affidavits of Gabriel Kaszovitz, ¶15, sworn to December 1, 1976, and Chaim I. Waxman, p. 9, sworn to December 1, 1976, respectively.) At the time the UJO motion was filed, Clemente was not yet occupied, but two buildings (B and C, comprising 228 units) had been certified for occupancy and 175 families held approved HDA leases and were preparing to move into those buildings. The temporary restraining order was

not signed by the court, and the matter was adjourned until December 6.

On December 6, the district court did sign the temporary restraining order before it had heard any evidence. The order restrained: (i) all third-party defendants and plaintiffs from taking occupancy, from proceeding with further tenanting or leasing, and from permitting occupancy of apartments in Clemente; and (ii) HDA from further approval of tenants who had been selected for tenancy by the Clemente sponsor.

On the same day, the Court began to hear witnesses called by UJO on their motion for a preliminary injunction. Hearings on this motion continued through Thursday, December 16, by which time UJO had called ten witnesses. At the end of the day, the district court adjourned the matter sine die, and from the bench the court continued the restraining order that was then about to expire. No reasons for the extension were entered on the record (Tr. 677)[5], and the court stated:

> We have been taking time out, time out, time out, and I don't think that anybody is in the mood for settlement, and as I indicated nobody is going to win this case.
>
> Good night.
>
> The temporary restraining order is continued. That is just overnight. That doesn't mean for another ten days. I will terminate it properly quite shortly. (Tr. 677)

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5 Reference to testimony shall be cited to the page of the transcript together with the abbreviation "Tr."

The hearings resumed on December 22, 1976, and testimony from additional witnesses called by the UJO was heard on that and the following day. No opportunity was provided to plaintiffs, third-party defendants Kent Village and Los Sures, or any other party to present witnesses concerning UJO's motion.

After the hearing on December 23, Judge Tenney issued the interim order which is the subject of this appeal. Citing Title VIII of the Fair Housing Act of 1968, 42 U.S.C. §3612(a) and (c), the court stated that "conciliation efforts were likely to lead to a satisfactory settlement." It continued the restraining order with respect to occupancy by forty-three lessees (members of the plaintiff class), despite the court's observation that their leases were valid and ultimately would have to be honored.

The notice of appeal was filed on December 29, 1976, along with an application for an expedited appeal, which was amplified by the instant motion for a stay.

The December 23 Order

The district court made no findings of fact or conclusions of law. Its order of December 23, like those of December 6 and 16, is silent as to any facts respecting discrimination in tenanting Clemente, as to the balancing of hardships, or as to the controlling law. Judge Tenney noted that the record before him, after seven days of hearings comprising over 800

pages of testimony from UJO's thirteen witnesses, was not a "complete record as yet." (Tr. 810). None of the appellants was given the opportunity to present their respective cases in opposition to UJO's motion during the hearings.

Appellants pointed out below the possible problem with denying their respective clients the opportunity to present their cases. After the second day of the presentation of UJO's case, appellants discovered that hearings would not be held on the Friday of that week (December 17) because the attorneys for HUD had a previous engagement. They also learned that after the following week, during which the district court was to hear another case, the court was planning to take several weeks of vacation.

> MR. TEITELBAUM: Your Honor, the plaintiffs will not be able to put their case in, as I hear the Court's schedule and the federal defendant's schedule. The plaintiffs will not be able to put their case in in the time allotted.
>
> (Tr. 151)

Two days later the issue was again raised:

> MR. TEITELBAUM: Your Honor, the defendant intervenors have had five days to put their case on. At the beginning the plaintiffs pointed out that they wanted to put their case on, too, and it appears now inevitable from your Honor's schedule, as I know it to be, that we won't have that opportunity . . .
>
> THE COURT: You will have that opportunity, but there is going to have to be a delay.

MR. TEITELBAUM: Well, your Honor, I understand that, but Mr. Kaszovitz and Mr. Skala [UJO's counsel] kept Mrs. Long on the witness stand for a day and a half.

* * *

It is their case, their burden, and it was their option to end the examination of Mrs. Long yesterday. They did not do that; and what they are doing now, they are jamming our case, and I might add, jamming everybody else's case. They have had five full days with a temporary restraining order staring us in the face, and people waiting for apartments. . . .

(Tr. 531-532)

Finally, on December 22, at the close of that day's hearing, appellants pointed out that they had not been given the opportunity to present their case:

THE COURT: It is past 3:00 o'clock. We will start again at 10:00 o'clock tomorrow morning. I don't know how long I can go tomorrow, but we will do the best we can.

MR. LUBELL: May I be heard just for a moment, because Clemente has not been able to -- has not been able to put on any case up to now because the intervening defendants are still continuing their case, and I understand that Friday is a court holiday, and I was just inquiring of the Court whether Clemente will be able to put on witnesses tomorrow or will we be precluded before the weekend from putting on any witnesses?

THE COURT: I don't know how much else they have to offer.

MR. LUBELL: Could we inquire of the intervening defendants?

THE COURT: Yes.

> MR. TEITELBAUM: Plaintiffs have the same question, your Honor. Will we be able to put on any of our witnesses? We had intended to call some experts on the issues that your Honor heard regarding housing patterns and what have you. We have not had the opportunity to present those witnesses to the Court.[6]
>
> (Tr. 771-772)

Likewise, there was no ambiguity as to whether mediation of any sort was proceeding at the time the district court entered its order on December 23. Plaintiffs had informed the district court at the start of trial that although a mediated settlement might be preferable to trial, the issuance and continuance of a temporary restraining order foreclosed any possibility of a mediated settlement (Tr. 76). The district court itself acknowledged on several occasions that mediation was not likely:

> THE COURT: We have been taking time out, time out, time out, and I don't think that anybody is in the mood for settlement...
>
> (Tr. 677; see also Tr. 152)

The very next day, however, and even after receiving oral and written confirmation that appellants could not engage in conciliation sessions while a temporary restraining order remained outstanding, the district court issued its "interim order"

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[6] As repeatedly as appellants raised the unfairness of the district court's hearing only UJO's case, the district court itself raised the issue of the time constraints that the Rules imposed on its temporary restraining order. On the ninth day after the temporary restraining order first went into effect, the district court, while indicating that a restraining order may be extended for a second ten-day period, underscored to UJO's counsel that its order could not exceed twenty days without being converted into a preliminary injunction (Tr. 150-151; see also Tr. 677).

premised on the likelihood of conciliation. This order, in effect, keeps approximately forty families from moving into the apartments for which they have paid deposits and for which they hold leases approved by HDA.

Despite these clear indications and acknowledgments that conciliation under HUD auspices was not taking place, the district court continued the previously imposed restraints, beyond twenty days, without complying with Rules 52 or 65, in reliance on 42 U.S.C. §3612.[7] That statute requires the court to "continue" a case in the pretrial stage if the Secretary of HUD or a local agency is engaged in conciliation efforts that "are likely to result in satisfactory settlement of the discriminatory housing practice complained of..." Here, the Secretary of HUD is a party to (not a conciliator of) this lawsuit; she has never caused her representatives to attempt conciliation, nor has any local housing agency (all of which are defendants in this lawsuit) ever acted as a conciliator. Further, no party or other person had reported to the court that a settlement was "likely." Nonetheless, the court relied upon §3612 as the basis for its "interim order" of December 23.

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[7]The text of §3612 appears on page 13.

§ 3612. Enforcement by private persons—Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Pub.L. 90-284, Title VIII, § 812, Apr. 11, 1968, 82 Stat. 88.

ARGUMENT

Point I

THE DECEMBER 23 "INTERIM ORDER" VIOLATES THE FEDERAL RULES OF CIVIL PROCEDURE AND DENIES APPELLANTS DUE PROCESS OF LAW.

Whether the district court's December 23 order is viewed as a temporary restraining order or as a preliminary injunction, it violates the Rules, as well as the due process rights of appellants which those Rules are designed to protect.[8]

A restraining order which is extended indefinitely beyond twenty days, no matter how it is labelled, is in fact a preliminary injunction, as this Court recognized in Pan American World Airways, Inc. v. Flight Engineers' International Assn., 306 F.2d 840 (2d Cir. 1962). As such, it must meet all of the requirements of law and of the Rules for the issuance of an injunction.[9] Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers ("Granny Goose"), 415 U.S. 423 (1974); Sampson v. Murray, 415 U.S. 61 (1974); Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (2d Cir. 1974); Morning Telegraph v. Powers, 450 F.2d 97 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972); Pan American World Airways, Inc. v. Flight Engineers' International Assn., supra. Viewed as

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8 The label in any event is not dispositive. See, Morning Telegraph v. Powers, 450 F.2d 97 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972), and citing Wright, Federal Courts, 459 (2d ed. 1970).

9 Preliminary injunctions are appealable under 28 U.S.C. §1292(a)(1).

a preliminary injunction, the district court's "interim order" meets virtually none of those requirements, and it must therefore be reversed.

First, in contravention of the plain terms of Rule 52(a), the order is not accompanied by findings of fact or conclusions of law.[10] Professor Moore, citing the Supreme Court Granny Goose and Sampson cases, states flatly that

> . . . where a restraining order is continued, without the consent of the party against whom it was issued and in violation of Rule 65(b), the order in effect becomes an interlocutory injunction, and on appeal will be reversed, unless findings of fact and conclusions of law have been made.

5A Moore's Federal Practice ¶52.07 at 2732 (2d ed. 1975); accord, County of Nassau v. Cost of Living Council, 499 F.2d 1340 (Temp. Emerg. Ct. App. 1974); Consolidation Coal Co. v. Disabled Miners of Southern West Virginia, 442 F.2d 1261 (4th Cir.), cert. denied, 404 U.S. 911 (1971). See also Rule 65(d) cited infra.

Secondly, in violation of Rule 65, no party other than the movants for the preliminary injunction was given an opportunity to present testimony prior to issuance of the injunction, even though the district court's attention had been frequently directed

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[10] Rule 52(a) states in pertinent part: "Findings by the Court. (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, . . .; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."

to the fact that the appellants wished to have that opportunity. Rule 65(a) states:

> No preliminary injunction shall be issued without notice to the adverse party.

and the Supreme Court has held that

> [T]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition. Sims v. Greene, 161 F.2d 87 (3d Cir. 1947).

Granny Goose, supra, at 432 n. 7. Accord, Glen-Arden Commodities, Inc. v. Costantino, supra, at 1030 n.2 (". . . the orders seem more characteristic of preliminary injunctions, which have no specific time limitation and which can be entered only after both sides have been heard."); Consolidation Coal Co. v. Disabled Miners of Southern West Virginia, supra; Detroit & Toledo Shore Line R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 357 F.2d 152 (6th Cir. 1966). Throughout the seven days of testimony offered by the movants UJO, appellants repeatedly expressed their concern that testimony in opposition to the motion was being precluded by the amount of time alloted to presentation of the UJO's case (much of it objectionable for lack of materiality), and by the district court's schedule, which was known to all parties in advance of the hearings. Unfortunately, these concerns were to become well-founded when appellants' rights to present evidence in opposition to the motion before

the issuance of an injunction were denied.[11]

These first two deficiencies in the district court's order -- denial of the opponents' right to be heard, plus the lack of findings of fact or conclusions of law -- inevitably create a third fatal deficiency. It is impossible to determine from the "interim order" whether the district court determined that the movants satisfied either of the alternative legal standards[12] for issuance of a preliminary injunction, and, if so, what law and proof the district court relied on in reaching its determination. The short-circuiting of the adversary process by not allowing opposition to the motion to be presented, when coupled with the failure to make findings of fact or conclusions of law, leave an insufficient record upon which to base injunctive relief.[13]

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11 For example, appellants were precluded from demonstrating that Title VIII, 42 U.S.C. §3612(a) may have precluded the district court from encumbering the property interests of persons (1) who signed leases prior to the institution of the action, and (2) who signed leases after the filing of the complaint but who are without actual notice thereof.

12 Before issuance of a preliminary injunction, there must be a clear showing of probable success on the merits plus irreparable harm to the movant if an injunction is not issued, OR a tipping of the balance of hardships in favor of the movant plus the raising of serious, substantial and difficult questions going to the merits. Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687, 692-99 (2d Cir. 1973).

13 While in appropriate cases this Court may examine the record to determine whether or not an injunction is justified, Sampson v. Murray, supra, at 86 n. 58, such an examination here would not be appropriate because of the one-sided nature of that record. To affirm issuance of the injunction on the basis of the record, even though appellants were precluded from presenting evidence, would only compound the district court's denial of appellants' due process rights.

(continued)

If the "interim order", on the other hand, is characterized as a second extension of the prior two temporary restraining orders, it violates those parts of Rule 65(b) and (d) which state in pertinent part:

> (b) Every temporary restraining order granted without notice[14] shall. . .; define the injury and state why it is irreparable and why the order was granted

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13 (continued)

However, should this Court choose to examine the record, it would at minimum find a complete failure of proof on the questions of irreparable harm and the balance of hardships. The record demonstrates, and the district court stated, that in the absence of an injunction, 157 non-white families will immediately occupy the 532-unit Clemente project. Each of these families holds a signed lease approved by all pertinent parties, including HDA, and declared valid by the district court. (Interim Order ¶¶3,4). These families would constitute approximately 30% of the number of families who will ultimately reside in Clemente, a non-white percentage below that found "not constitutionally offensive" by the district court (Interim Order, ¶4). On this record, a finding of irreparable harm to the UJO could not have been made.

Consideration of the "balance of hardships" factor in the alternative preliminary injunction test follows essentially the same analysis, with additional consideration required of the hardship incurred by the enjoined party. As stated above, members of the plaintiff class who are prevented by the December 23 order from moving into their new homes are suffering extreme hardship. The evidence in this record bearing on the question of hardships reveals, on the movants' side, an undifferentiated, unsubstantiated fear of the unknown, by contrast with concrete, immediate harm to the enjoined parties. A preliminary injunction could not properly be issued on such a record.

14 The Supreme Court has made clear that the "without notice" provision of Rule 65(b) does not mean that a temporary restraining order issued after notice to the parties can be extended indefinitely. Granny Goose, supra, at 432 n.7. An injunctive order issued before all parties have had notice and an opportunity to be heard, as in this case, is strictly limited to twenty days' duration. Id. at 442-443. See also, Glen Arden Commodities, Inc. v. Costantino, supra, at 1030 n. 2.

> without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. . .
>
> (d) . . . Every order granting an injunction and every restraining order shall set forth the reasons for its issuance;. . . .[15]

The December 23 order extended the prior restraining order indefinitely beyond the twenty-day period permitted by the Rule. It contains (i) no statement concerning irreparable injury, (ii) no finding as to "good cause shown" for the most recent extension,[16] and (iii) no entry on the record of the reasons for its issuance. The order's issuance constitutes reversible error on these grounds alone. Pan American World Airways, Inc. v. Flight

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15 Continuation of a temporary restraining order beyond the period of statutory authorization is appealable under 28 U.S.C. §1292(a)(1). Pan American World Airways, Inc. v. Flight Engineers' International Assn., 306 F.2d 840, 843 (2d Cir. 1962), and cases cited therein.

16 When the district court first extended the restraining order, on December 16, 1976, reasons for the extension likewise were not given. Rather, the court stated: "The temporary restraining order is continued. That is just overnight. That doesn't mean for another ten days. I will terminate it properly quite shortly." (Tr. 677) No reason for the court's apparent subsequent change of mind appears on the record.

Engineers' International Assn., supra; see Telex Corp. v. International Business Machines Corp., 464 F.2d 1025 (8th Cir. 1972); National Mediation Board v. Air Line Pilots Int'l Assn., 323 F.2d 305 (D.C. Cir. 1963). As Judge Hays noted for this Court in the Pan American case, supra, at 843:

> It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.[17]

Plaintiffs are indeed suffering drastic, adverse consequences as a result of the "interim order." To date, they have been "temporarily" restrained for more than a month from taking possession of the new homes for which they hold valid leases approved by the appropriate governmental agencies. Their plight exemplifies the importance of and the policies underlying the protective provisions of Rule 65.

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17 Cited with approval by the Supreme Court in Granny Goose, supra, at 439.

Point II

TITLE VIII DOES NOT AUTHORIZE THE DISTRICT COURT TO SUPERCEDE THE PROCEDURAL PROTECTIONS OF RULES 52 AND 65.

As the basis for its "interim order," the district court cited the "authority vested in this Court under Section 812 of Title VIII of the Fair Housing Act of 1968, 42 U.S.C. §§3612 (a) and (c)"[18] and its belief that "conciliation efforts are likely to result in a satisfactory settlement of the current dispute." (Interim Order, p. 1). That reliance is misplaced for two reasons: the cited statutory provisions do not pertain to these proceedings, which are already on trial; in any event, the cited provisions can and should be read as consistent with and not contrary to Rules 52 and 65. Additionally, the district court's belief as to the likely success of conciliation efforts is without any factual support; as the district court was well aware, the facts indicated precisely the opposite.

Sections 3612(a) and (c) Do Not Apply In The Circumstances Of This Case.

From June 7 through December 3, 1976, the parties, by stipulation, suspended litigation efforts (including pre-trial discovery) and engaged in mediation under the auspices of the Community Relations Service of the United States Department of Justice.

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18 Section 3612 is reproduced in full at p. 13 , supra.

The Secretary of HUD, as well as officials of HDA and NYCHA, were parties to the stipulation and the mediation efforts. On December 3, UJO unilaterally put an end to mediation and resurrected the court proceedings by moving by order to show cause for a preliminary injunction. Tenanting of Clemente Plaza was "temporarily" restrained, the trial on the UJO's motion began, and the previously suspended discovery proceedings resumed on December 6, 1976. Since that date, appellants continuously informed the district court that they could not participate in both mediation and the trial on UJO's motion simultaneously. It was appellants' position that mediation could not continue as long as the tenanting of Clemente was restrained by the district court's order. By letter of December 23, delivered before the entry of the order appealed from, appellants again informed the district court of the unfeasibility of settlement in light of the continuing restraining order.

These facts render §§3612(a) and (c) plainly inapplicable to these proceedings. First, those subsections deal with conciliation efforts of the "Secretary [of HUD] or a state or local agency." They are part of the administrative conciliation mechanism of Title VIII which is available to private parties claiming discrimination in housing. The statute does not, however, require private parties to use the conciliation mechanism before bringing a lawsuit. In this case, plaintiffs did not resort to administrative conciliation prior to filing suit, and neither the Secretary of HUD nor

the relevant state or local agency has ever acted as a conciliator. Indeed, each of the pertinent governmental agencies, including HUD and its Secretary, are parties to this action; each represents interests adverse to each of the others' and to those of the plaintiffs and third-party defendants.

Second, the cited sections only permit the court to continue a case "from time to time before bringing it to trial." Thus, when, as here, a trial has begun, this provision does not apply. That this plain reading is clearly correct is obvious by reference to Section 3610(f) of Title VIII, which states: "Whenever an action filed by an individual, in either Federal or State Court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance." 42 U.S.C. §3610(f). Thus, even had there been ongoing conciliation efforts under HUD's auspices, they would have had to be halted once this proceeding came to trial -- rather than vice versa.

Finally, in this case any claimed conciliation efforts sponsored by the Justice Department's Community Relations Service certainly terminated at the time of UJO's motion. Counsel for appellants informed the district court of that fact many times after the taking of testimony began on December 6. The most that can be said is that before December 23, the various parties attempted, on several occasions, at the urging of the Mayor of the City of New York, to explore the possibility of an out-of-court

settlement. These discussions were consistently unproductive, and the parties remain far apart in their positions. The December 23 letter specifically addresses the issue of conciliation as mentioned in Title VIII. It informed the district court, before the entry of the "interim order," that appellants did not envision any possibility for resolution of the issues through conciliation and "are not presently engaged in mediation or conciliation efforts." No conciliation efforts have taken place since that date, and none are contemplated. There was and remains simply no basis for the district court's stated "belief" concerning conciliation. As a result, the invocation of Section 3612 as a basis for the "interim order" was wholly erroneous.

Sections 3612(a) and (d) Do Not Sanction Supercession of Federal Rules 52 and 65.

Even if there were a basis in the record for invoking §§3612(a) and (c), nothing in those provisions permits a court either to extend a temporary restraining order beyond the time limits set in Rule 65(b), or to grant an injunction without giving an opportunity to be heard to the parties opposing it, and without making findings of fact and conclusions of law, as required by Rule 52. What the Supreme Court said in Granny Goose, supra, at 434, about another federal statute applies equally here:

> . . .[The statute] can and should be interpreted in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with the important congressional policies reflected in the time limitations in Rule 65(b).

Subsections 3612(a) and (c) do not conflict with the important congressional policies that underlie Rules 52 and 65---except as a result of the tortured interpretation given those provisions by the district court. Nothing in Section 3612 contemplates "continuing" a case indefinitely in the hope of "conciliation" while a restraining order or injunction is in effect and there is an ongoing hearing; and Section 3610(f), which calls for an immediate termination of conciliation efforts when trial begins, suggests that congressional policy is precisely the opposite of what the lower court thought it to be. Thus, courts in Title VIII cases consistently and routinely have adhered to the requirements of Rule 65 in making determinations on preliminary injunction motions (see, e.g., Dillon v. Bay City Construction Co., Inc., 512 F.2d 801 (5th Cir. 1975); North Avondale Neighborhood Housing Ass'n. v. Cincinnati Metropolitan Housing Authority, 464 F.2d 486 (6th Cir. 1972); Banks v. Perk, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), aff'd in part, rev'd in part, 473 F.2d 910 (6th Cir. 1973); Zuch v. Hussey, 394 F. Supp. 1028, 1052 (E.D. Mich. 1975)) nowhere in any of these cases is there a suggestion that the issuance of injunctions in Title VIII actions is governed by standards different from those contained in the Rules. Nor is there a shred of authority that the cited provisions of Title VIII conflict with or override the requirements of Rules 52 and 65.

That the district court was bound in this case to follow the requirements of Rules 65 and 52, and that it ought not to have suspended those procedural protections by resort to a strained reading of Title VIII, is further supported by reference to the list of statutes which Congress explicitly exempted from the ambit of Rule 65.[19] Title VIII is not among those listed, although the Rules have been amended since the enactment of the Fair Housing Act of 1968. Had Congress meant to adopt special procedures governing injunctive relief in Title VIII cases, it could have included Title VIII in the list of statutes contained in Rule 65(e). By not doing so, Congress must be assumed to have indicated that injunctive relief ordered under the Fair Housing Act is to be governed by Rules 52 and 65, as is all other federal legislation not expressly excluded from the operation of those Rules.

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19 Rule 65(e) states: "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., §2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

Point III

ADHERENCE TO THE FEDERAL RULES NECESSITATES THAT THIS COURT VACATE THE "INTERIM ORDER" OR DIRECT THE DISTRICT COURT TO DO SO FORTHWITH.

As demonstrated in Points I and II, the district court's December 23 order was issued in disregard of Rules 52 and 65 and was not authorized by the provisions of the Fair Housing Act of 1968 cited by the district court. There remains the question of what remedy this Court should order to correct the error below. Appellants suggest that the only appropriate remedy in this situation is for this Court either to vacate the "interim order" or to direct the district court to do so immediately upon the remand of this case.

Several reasons support the propriety of vacating the December 23 order forthwith. First, if the procedural protections for litigants that are so carefully detailed in Rules 52 and 65---the right to be heard, the right to have the court find the facts and state the law it is applying, and the right not to be subjected for more than twenty days to a coercive order obtained ex parte---are to have any meaning in practice, they must be literally and promptly enforced. To remand this case to the district court with directions to conduct further hearings and then to make findings and conclusions at some future date would not satisfy, but rather would undercut these protective aims of the Rules.

Secondly, the hardship factor in this case is extraordinarily compelling. Indisputably valid leaseholders now living in inadequate housing are being excluded from their new apartments in the midst of winter for no clear reason. They are ready to move in and their apartments are ready for them. Unless the December 23 order is vacated, it will keep those families out of their new homes for an indefinite period of time until the district court can reschedule and complete the hearings and prepare appropriate findings and conclusions.

Thirdly, to vacate the injunction-like "interim order" will not here, as it might in some other situations, effectively terminate this litigation. Clemente is scheduled to have 532 apartment units when completed in the next few months. The 157 leaseholders described in the "interim order" will have, then, only about 30% of the total number of available apartments (not 35%, as the district court indicated), and the 43 leaseholding families whose rights to occupancy are involved in this appeal will have only about 8% among that 30% of available apartments. Because these percentages of minority occupants are so low, the district court would---even if all present leaseholders were allowed to move in---have sufficient flexibility to order any reasonably anticipable remedy at the conclusion of hearings. (No party below has seriously urged that minority persons ultimately be granted less than about 30% of the apartments at Clemente.) Thus, the hardship imposed by the "interim order" is not only severe but unnecessary as well.

CONCLUSION

FOR THE REASONS STATED ABOVE, THIS COURT SHOULD VACATE THE DECEMBER 23 ORDER OF THE DISTRICT COURT

Dated: New York, New York
January 5, 1977

Respectfully submitted,

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